State of Rhode Island and Providence Plantations

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Peter F. Kilmartin, Attorney General

VIA EMAIL ONLY

February 16, 2015
PR 15-06

Mr. Bill Nangle

Re: Nangle v. Town of North Smithfield

Dear Mr. Nangle:

The investigation into your Access to Public Records Act ("APRA") complaint filed against the Town of North Smithfield ("Town") is complete. By email correspondence dated December 2, 2014, you allege the Town violated the APRA when it denied your APRA request dated September 27, 2014, which requested:

> "the complete list of all names and email addresses that [Administrator Hamilton] use[s] to send out * * * town wide North Smithfield newsletters."

By email correspondence dated December 3, 2014, this Department requested that you supplement your complaint indicating the public interest that would be advanced by the disclosure of the requested records. You replied on December 16, 2014, indicating that you are "looking to insure transparency in government and in the use of public funds which Administrator Hamilton uses to send her emails."

In response to your complaint, we received a substantive response from the Town's legal counsel, James J. Lombardi, III, Esquire, who also provided an affidavit from the Town Administrator Paulette D. Hamilton. Attorney Lombardi states, in pertinent part:

> "The Town's concern, and reason for denying the request, is the email list itself and associated names, not the content of the emails. * * *
>
> The release of names and email addresses to the public are exempt based upon the following:

1. The requested email list is specifically exempt under both RIGL § 38-2-2(4) and RIGL § 38-2-2(4)(M) 'Correspondence of or to elected officials with or relating to those they represent and correspondence of or to elected officials in their official capacities.' * * * [A]ll communications from the email list that was requested were sent by an elected official as the Town Administrator, in her official capacity. It is the Town's position that the content is both not a public record and also exempt.

2. The names and email list requested is an unwarranted invasion of privacy that is exempt under RIGL § 38-2-2(4)(A) and/or further that it has little or no value to the public interest and we believe it would have a chilling effect on communications to residents. It is not a central function of government and does not provide any incite [sic] into the Town's inner workings. The Town looks to Fuka v. Rhode Island Dept, of Environmental Mgt., C.A. No.: PC 07-1050, * * * 'Here, not only is there strong privacy interest against the involuntary disclosure of one's home address, but the Alliance has failed to announce a sufficient public interest which would suffice to overcome the licensees' right to privacy.' It further states, 'a list containing the names and addresses of all of the DEM's licensees does not provide any insight into the inner-workings of the DEM.' Although it is referring to a name and address, we would argue the analysis by the Court would be similar to names and email addresses. In Direct Action for Rights and Equality v. Gannon (DARE I), 713 A.2d 218 (R.I. [1]998), 'The purpose of this chapter is to facilitate public access to governmental records which pertain to the policy making functions of public bodies and/or are relevant to the public health, safety, and welfare.' We contend here that the names and email list are not a central function of government and do not provide any incite [sic] into the Town's inner workings. * * * We would argue that the names and email list have little or no value to the public interest. * * * It is the Town's position that if residents begin to receive emails from third parties that are objectionable or not wanted[,] there would be a reduction to both sign up for the emails and also there would be a reduction in our ability to communicate to residents. The Town believes that the content is important to the public but there is little to no public interest in the method by which the Town Administrator communicates. There is an additional expectation of privacy from people who sign up for emails from the Town, and would not want their names and emails released and then possibly sold to third parties."

Administrator Hamilton states, in pertinent part:

"I routinely send out communications by email and a newsletter to individuals and businesses.
The communications are sent by me or under my direction and to the best of my knowledge always has my name or the Administrator's Office, as the sender.

> It has always been my intent that all communications are official communications sent under my authority as an elected official.
>
> To receive communications from the Town, a person or business can either sign up on the Town's website or request to be added. My office routinely asks residents who contact us if they are interested in receiving the e news.
>
> I am not aware of any other way that [a resident] would be added to the list and [a resident] ha[s] a right to opt out at anytime. The email list is not sold or rented."

You did not file a rebuttal to the Town's response.

At the outset, we note that in examining whether a violation of the APRA has occurred, we are mindful that our mandate is not to substitute this Department's independent judgment concerning whether an infraction has occurred, but instead, to interpret and enforce the APRA as the General Assembly has written this law and as the Rhode Island Supreme Court has interpreted its provisions. Furthermore, our statutory mandate is limited to determining whether the Town violated the APRA. See R.I. Gen. Laws § 38-2-8. In other words, we do not write on a blank slate.

The APRA's stated purpose is both "to facilitate public access to public records" and "to protect from disclosure information about particular individuals maintained in the files of public bodies when disclosure would constitute an unwarranted invasion of personal privacy." R.I. Gen. Laws § 38-2-1. Similarly, the United States Supreme Court has made clear that the federal Freedom of Information Act ("FOIA"):

> focuses on the citizens' right to be informed about 'what their government is up to.' Official information that sheds light on an agency's performance of its statutory duties falls squarely within that statutory purpose. That purpose, however, is not fostered by disclosure of information about private citizens that is accumulated in various governmental files but that reveals little or nothing about the agency's own conduct. U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 773, 109 S.Ct. 1468, 1481-82 (1989) (emphasis supplied).[1]

The Court further explained that:

> the FOIA's central purpose is to ensure that the Government's activities be opened to the sharp eye of public scrutiny, not that information about private

[1] The Rhode Island Supreme Court has stated that "[b]ecause [the] APRA generally mirrors the Freedom of Information Act, 5 U.S.C.A. § 552 (West 1977), we find federal case law helpful in interpreting our open record law." Pawtucket Teacher's Alliance Local No. 920 v. Brady, 556 A.2d 556, 558 n.3 (R.I. 1989).

> citizens that happens to be in the warehouse of the Government be so disclosed. Thus, it should come as no surprise that in none of our cases construing the FOIA have we found it appropriate to order a Government agency to honor a FOIA request for information about a particular private citizen. Id. at 774-75, 109 S.Ct. at 1482 (emphases in original).

The instant case implicates the amended R.I. Gen. Laws § 38-2-2(4)(A)(I)(b), which exempts from public disclosure, in pertinent part:

> Personnel and other personal individually-identifiable records otherwise deemed confidential by federal or state law or regulation, or the disclosure of which would constitute a clearly unwarranted invasion of personal privacy pursuant to 5 U.S.C. 552 et. seq...[.] (Emphasis added).

This Section is modeled after 5 U.S.C. § 552 (b)(6), which exempts from disclosure all "personnel and medical files and similar files...which would constitute a clearly unwarranted invasion of personal privacy."

Here, we must determine whether the disclosure of the names and email addresses requested constitutes a "clearly unwarranted invasion of personal privacy." The United States Supreme Court relied on House and Senate Reports to interpret this phrase. See Dep't of Air Force v. Rose, 425 U.S. 352, 355-57 (1976). The House report stated that "[t]he limitation of a 'clearly unwarranted invasion of privacy' provides a proper balance between the protection of an individual's right of privacy and the preservation of the public's right to Government information by excluding those kinds of files the disclosure of which might harm the individual." See id. at 373. Similarly, with respect to a "clearly unwarranted invasion of privacy," the Senate report weighed the "interests between the protection of an individual's private affairs from unnecessary public scrutiny, and the preservation of the public's right to governmental information." See id. The Supreme Court thus determined that the legislative intent promulgated a balancing test between the individual's privacy interests and the public's right to disclosure.

In United States Department of Justice, et al. v. Reporters Committee for Freedom of the Press, et al., the United States Supreme Court held that a "rap sheet" of a private citizen within the Government's possession was not public. The Supreme Court examined 5 U.S.C. § 552 (b)(7), which excludes records or information compiled for law enforcement purposes from disclosure only if production of such documents "could reasonably be expected to constitute an unwarranted invasion of personal privacy." See 489 U.S. 749, 756 (1989) (emphasis added). Unlike the language contained in Exemption (b)(6) and R.I. Gen. Laws § 38-2-2(4)(A)(I)(b), the word "clearly" is omitted in Exemption (b)(7). See id. at 756. The Supreme Court's analysis, however, sheds light on what factors constitute an "unwarranted" invasion of personal privacy. See id. at 772. "[W]hether disclosure of a private document under Exemption 7(C) is warranted must turn on the nature of the requested document and its relationship to 'the basic purpose of the Freedom of Information Act 'to open agency action to the light of public scrutiny.'" See id. The Supreme Court explained:

> [w]hen the subject of such a rap sheet is a private citizen and when the information is in the Government's control as a compilation, rather than as a record of 'what the Government is up to,' the privacy interest protected by Exemption 7(C) is in fact at its apex while the FOIA-based public interest in disclosure is at its nadir...Accordingly, we hold as a categorical matter that a third party's request for law enforcement records or information about a private citizen can reasonably be expected to invade that citizen's privacy, and that when the request seeks no 'official information' about a Government agency, but merely records that the Government happens to be storing, the invasion of privacy is 'unwarranted.'

See id. at 780. (Emphasis added). Thus, because the "rap sheet" did not shed light on how the Government operates, the privacy interests of the individual outweighed the public's interest in the citizen's "rap sheet."

In 2007, the Rhode Island Superior Court determined that the addresses of licensed fishermen were exempt under the APRA. See Fuka v. RI Dept. of Environmental Mgmt, 2007 WL 1234484 (Indeglia, J.). Although the Court decided this case pursuant to the balancing test set forth in DARE v. Gannon, 713 A.2d 218 (R.I. 1998), we find the Court's conclusion and balancing analysis applicable to the instant matter. Again, the main purpose of the APRA is to "shed light on how Government operates." See Reporters Committee, 489 U.S. at 780.

Respectfully, using the standards set forth above, you have demonstrated little to no "public interest" in disclosure of the list of all names and email addresses that the Town uses to send out newsletters. Although you claim that disclosure will ensure transparency in government and in the use of public funds, it is unclear to us how the disclosure of the names and email addresses will materially advance the public's interest in shedding light on government operations. Id. While we certainly do not adopt a per se rule, disclosure of the names and email addresses of those who subscribe to a Town's email newsletter will not shed any light on government operations. Balanced against this minimal, if any, "public interest," we perceive greater privacy interest. Indeed, such was precisely the conclusion in Fuka, as well as several United States Supreme Court opinions. See also United States Department of Defense v. Federal Labor Relations Authority, 510 U.S. 487 (1994)(home addresses of agency employees represented by unions are exempt under the Freedom of Information Act); United States Department of State v. Ray, 502 U.S. 164 (1991)(disclosing names of illegal emigrants constituted clearly unwarranted invasion of personal privacy); Bibles v. Oregon Natural Desert Ass'n, 519 US 355 (1997)(mailing list containing names and address where newsletter sent not a public record). Accordingly, similar to the foregoing cases, we conclude that the list of names and email addresses that the Town Administrator uses to send out Town wide newsletters are exempt under R.I. Gen. Laws § 38-2-2(4)(A)(I)(b) and the balancing test, and therefore find no violation.

Although the Attorney General has found no violation, nothing within the APRA prohibits an individual or entity from obtaining legal counsel for the purpose of instituting injunctive or

declaratory relief in Superior Court. See R.I. Gen. Laws § 38-2-8(b). Please be advised that we are closing this file as of the date of this letter.

We thank you for your interest in keeping government open and accountable to the public.

Very truly yours,

Lisa Pinsonneault
Special Assistant Attorney General
Extension 2297

LP/pl

Cc: David Igliozzi, Esquire